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No. 83-1556

In The
Supreme Court of the United States
October Term, 1983

MICHAEL ADAMS,

Petitioner,

vs.

PROVIDENCE & WORCESTER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT, PROVIDENCE & WORCESTER COMPANY, IN OPPOSITION

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QUESTIONS PRESENTED

At the outset respondent respectfully suggests that the questions presented for review, as characterized by either petitioner or respondent, are not of the "special and important" character which warrant the grant of review by this Court, presenting neither a decision by the Court of Appeals in conflict with the decisions of other courts of appeal or of this Court, nor a departure by the Court of Appeals from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision, nor an important question of federal law which should be settled by this Court.

Respondent respectfully submits that this case presents the following questions:

1. Did the Court of Appeals have the power to review the District Court's ruling on the admissibility of certain evidence?
2. Did the Court of Appeals have the power to remand the case for a new trial limited to the issue of damages for physical pain and mental anguish only?

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STATEMENT OF THE CASE

With the exception of the following modifications, respondent is satisfied with petitioner's statement of the case for purposes of this Court's consideration of the questions presented for review.

Respondent has never accepted, and does not accept here, petitioner's characterization of his removal from service on August 28, 1980 as a "medical disqualification."

Indeed, petitioner's characterization assumes the existence of the very issue decided against him by the Court of Appeals, namely, that the letter removing petitioner from service (reproduced at page 25a of the Petition; also at page 5, *infra*) constituted neither an admission nor any other probative evidence of any physical disability. (*Adams v. Providence and Worcester Company*, 721 F.2d 870, 872 (1st Cir. 1983); Petition, 18a-19a, 21a.)

Further, petitioner fails to point out that respondent's Fed. R. Civ. P. 59 motion for new trial specifically claimed that the jury verdict was excessive because there was no evidence of impaired future earning capacity. (*Adams v. Providence & Worcester Company*, 564 F.Supp. 1373, 1375 (D. Mass. 1983); Petition, 4a, 7a.) The issue, therefore, was directly before the District Court which had the opportunity to consider all of the evidence in the case, including the so-called "seven distinct items of evidence" referred to at pages 27-29 of the Petition. Petitioner did not refer to these "items of evidence" either in opposing respondent's motion for new trial, in his brief to the Court of Appeals or in his petition for rehearing to the Court of Appeals. Petitioner's first reference to these items of evidence comes in the instant petition. In any event, as will be discussed *infra*, these items of evidence are no more probative of impaired earning capacity than was the so-called letter of "medical disqualification."

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Properly Exercised Its Appellate Authority in Reversing the Evidentiary Ruling of the District Court.

Petitioner here claims that the Court of Appeals "exceeded the bounds of proper appellate review" (Petition,

12) in reversing the District Court's ruling that the "removal from service" letter was admissible in evidence. Petitioner cites no pertinent legal authority for this contention, the reason for which omission is clear: appellate courts are clearly empowered to correct abuses of discretion by trial courts with regard to evidentiary rulings. *See, e.g., Bowden v. McKenna,* 600 F.2d 282, 283 (1st Cir. 1979), cert. denied, 444 U.S. 899 (1979); *United States v. Harvey,* 547 F.2d 720, 723-724 (2d Cir. 1976); *Utility Control Corporation v. Prince William Construction Co., Inc.,* 558 F.2d 716, 721 (4th Cir. 1977); *Ballou v. Henri Studios, Inc.,* 656 F.2d 1147, 1155-1156 (5th Cir. 1981); *Charter v. Chleborad,* 551 F.2d 246, 249 (8th Cir. 1977), cert. denied, 434 U.S. 856 (1977); *United States v. Aims Back,* 588 F.2d 1283, 1286-1287 (9th Cir. 1979); *United States v. Dothard,* 666 F.2d 498, 504-505 (11th Cir. 1982).

The result of an appellate court's decision that the admission of evidence was reversible error is to exclude such evidence from being admitted at a new trial. *See, e.g., United States v. Dothard,* 666 F.2d 498, 505 (11th Cir. 1982).

There is nothing novel or important about this issue, and in the case at bar the First Circuit simply concluded that a certain piece of evidence should have been excluded by the trial judge because it had little, if any, probative value and because whatever probative value it may have had was outweighed by the fact that it "clearly caused confusion and resulted in prejudice." (721 F.2d at 872; Petition, 21a.) It can scarcely be said that the Court of Appeals' action constituted a "departure from the accepted and usual course of judicial proceedings" (Supreme Court Rule 17.1(a)), and, while respondent submits

that a petition for certiorari is not an appropriate occasion for an analysis of the facts of a case,[1] an analysis of the pertinent facts in the present case demonstrates that the First Circuit's action was entirely proper and, indeed, that its decision was right.

A. The Letter Was Not Relevant.

At trial, petitioner testified without contradiction that he was injured in the course of employment and that he subsequently was able to, and did, for a period of nearly three years until the time he was removed from service, perform precisely the same job he had performed before the accident. Respondent did not dispute that petitioner was removed from service because of the assertion in his complaint, seeking damages under the Federal Employers Liability Act (FELA) and the Safety Appliance Act (SAA), that:

> As a result of the said accident, the plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind and will so continue to suffer for an indeterminate period of time in the future; that prior to said accident, the plaintiff was a strong able-bodied man capable of earning and actually earning the wages of a trainman as an employee of the defendant corporation; that as a result of the said accident, the plaintiff had been incapacitated and prevented from engaging in his employment, and that the plaintiff will continue to be so incapacitated in the future . . .

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[1] "Granting of the writ [of certiorari] would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178 (1938). *See, e.g., N.L.R.B. v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503 (1951).

Respondent further did not dispute that, upon its receipt of the complaint, its general manager removed petitioner from service. Respondent did, however, object to the admission in evidence of a letter from its general manager notifying petitioner that he had been removed from service. (Trial Transcript, December 16, 1982, p. 1-34.) The letter, dated August 28, 1980, read as follows:

> Dear Mr. Adams:
>
> It has come to my attention today, through your attorney, that because of an injury suffered by you on August 16, 1977 that, 'As a result plaintiff was made sick, sore and lame and has suffered great pain of body, anguish of mind, and will so continue to suffer for an indeterminate period of time in the future; that prior to said accident the plaintiff was a strong able-bodied man capable of earning and actually earning the wages of a Trainman as an employee of the defendant Corporation; that as a result of said accident, the plaintiff had been incapacitated and prevented from engaging in his employment and that the plaintiff will continue to be so incapacitated in the future.'
>
> In view of the above representation of your physical and mental condition, that you have made through your attorney, and the fact that your physical and mental condition is responsible for the safety of priviate citizens and fellow-employees, I find it necessary to remove you from train service immediately.

The Court of Appeals held that it was reversible error to admit the August 28, 1980 letter into evidence. (721 F.2d at 873; Petition, 21a.) Contrary to petitioner's contention, the court ruled that the letter was not an admission by respondent that petitioner was disabled. (721 F.2d at 872; Petition, 18a.) Instead, the court ruled that "the letter cannot be read to state more than that the employer

did not want a man who represented himself to be incapacitated on its payroll." (721 F.2d at 872; Petition, 19a.)[2] The court rightly concluded that in light of petitioner's own testimony as to his ability to perform his work and his willingness to do so, respondent's mere recitation of petitioner's "false" allegations in his complaint was not probative of petitioner's "disability" — indeed, was not probative of anything other than the fact that petitioner "was discharged because of the allegations in the complaint" (721 F.2d at 872; Petition, 18a), a matter which the court found was highly prejudicial to respondent.[3]

B. The Prejudicial Effect of the Letter Outweighed Any Probative Value.

The Court of Appeals concluded that "the admission of [the letter] clearly caused confusion and resulted in prejudice" (721 F.2d at 872; Petition, 21a), substantially outweighing any probative value it might have had. The court noted petitioner's own testimony that he was not incapacitated at any time from November 2, 1977, when he returned to work, up to and throughout the trial, that

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[2] The court also noted that "A railroad employee who represents to the railroad that he is incapacitated makes the railroad extraordinarily vulnerable in actions involving that employee brought by fellow employees or third persons against the railroad." (*Id.*) As this Court has stated, "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service." *Minneapolis, St. P. & S. Ste. M.R. Co. v. Rock*, 279 U.S. 410, 413-414 (1929).

[3] The court noted that this was not an action for wrongful discharge and that the effect of petitioner's "discharge, brought about by the false statements in the complaint," would be decided in some other forum. (721 F.2d at 872; Petition, 19a).

throughout that period and at trial he considered himself "fully able to carry out [his] old job." (721 F.2d at 871-872; Petition, 16a-17a, 20a.)

Further, the court heard petitioner's own argument on appeal that the jury could have allocated $510,000 of the $625,000 verdict to impairment of earning capacity, leaving approximately $67,800 for "past wage loss" and $47,200 for "pain and suffering and mental anguish." (Petitioner's Brief on Appeal, 22.) Given the obvious and absurd paradox in an award of more than $500,000 for impaired earning capacity to an individual who both resumed his full duties for nearly three years after his injury and testified to the jury that he was perfectly fit to continue working as a trainman, the court was compelled to the conclusion that the letter "clearly caused confusion and resulted in prejudice."[4]

Respondent is not unaware, as the First Circuit acknowledged, that "appellate courts do not often second-guess trial courts in balancing relevance against prejudice." (721 F.2d at 872; Petition, 20a.) But appellate courts, in a very real sense, are the courts of last resort to guard against the very kind of prejudice which was

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[4] The prejudicial effect of the admission of the letter is clear in that it allowed the jury to infer that respondent sought to punish petitioner for merely seeking to enforce his rights under the FELA or that it was simply unfair that his employment had been terminated. Indeed, counsel for petitioner argued to the jury that petitioner "is being prevented from work as a result of this medical disqualification [by respondent]" and that if respondent "wants to medically disqualify Michael Adams as a trainman at the Providence and Worcester Railroad because of that finger in 1977 [it] has to pay compensation to Michael Adams for damaging his earning capacity." (Trial Transcript December 17, 1982, p. 2-31).

worked in this case. And while the infrequency of having to perform its safeguarding role is a credit to the district courts, the courts of appeal exist to perform that role when necessary. As the Fifth Circuit put it, in commenting on the proposition that a trial court has discretion to admit or exclude evidence, "While we of course agree with this statement as a general proposition, it is equally plain that this discretion is far from unlimited and that appellate courts have a vital role to play in overseeing the exercise of this discretion." *United States v. Robinson*, 544 F.2d 611, 616 n.6 (5th Cir. 1976), cert. denied, 435 U.S. 905 (1978).

II. The Court of Appeals Appropriately Remanded the Case for a New Trial on the Issue of Damages for Physical Pain and Mental Anguish Only.

Petitioner claims that the Court of Appeals committed error and ruled in conflict with the opinions of this Court and other courts of appeal in remanding the case for a new trial on a limited damages issue. (Petition, 21.) Respondent respectfully submits that the decision of the First Circuit was not only not in conflict with this Court or any other circuit, but was a judicious exercise of its appellate power.

Petitioner's argument is based entirely on the premise that the Court of Appeals directed judgment for respondent in a situation where respondent had not filed motions for directed verdict or judgment notwithstanding the verdict under Fed. R. Civ. P. 50. As will be demonstrated, the premise itself rests upon a misapprehension by petitioner as to what the Court of Appeals did.

The Court of Appeals did not direct the entry of judgment for respondent. On the contrary, it is clear

that the court affirmed the judgment of the District Court in favor of petitioner on all issues of liability.[5] As to damages, the court simply remanded the case for a new trial because the verdict was excessive and not supported by the evidence. While the court did rule as a matter of law that the petitioner was not entitled to recover on one element of damages alleged to have been suffered, it is incorrect to say that the Court of Appeals directed a judgment on the issue of loss of earning capacity since judgments can only be directed on issues of liability, not damage. All the court did was rule that on the basis of the evidence, primarily petitioner's own testimony, he is not entitled to damages for loss of earning capacity. The court's actions were neither unusual nor improper. Indeed, in virtually every case where appellant claims the damage award is grossly excessive, the appellate court must consider and decide what damages plaintiff is entitled to, just as it did in this case.

Petitioner's reliance on *Cone v. West Virginia Pulp and Paper Company*, 330 U.S. 212 (1947), *Globe Liquor Company v. San Roman*, 332 U.S. 571 (1948), *Johnson v. New York N. H. & H. R. Co.*, 344 U.S. 48 (1952) and *Iacurci v. Lummus Company*, 387 U.S. 86 (1967) is misplaced, and his strenuous efforts to fit the present case into the mold to which those cases apply are unavailing. As this Court has stated, the opinions in *Cone*, *Globe* and *Johnson* "make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed

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[5] Footnote one to the court's opinion states: "We do not here consider the sufficiency of the evidence to sustain the jury's findings on the liability issues since the defendant made no motion for a directed verdict." [citations omitted] (721 F.2d at 871; Petition, 15a).

strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved." *Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967). This language alone distinguishes the present case from those cases. In the first place, the First Circuit did not order the entry of judgment for the verdict loser, respondent; it affirmed the judgment on liability in favor of the petitioner. Indeed, in that regard its decision was completely in harmony with *Cone*. Second, respondent's decision not to move under Rule 50 has no bearing on the appellate court's power to review the excessiveness of the verdict.

As has been pointed out, respondent could not have moved for a directed verdict solely on the extent of damages. Nor was respondent bound to file motions for directed verdict or judgment n.o.v. if it chose only to contest the size of the verdict. Respondent took the only action it needed to take, or even could have taken, to preserve its right to appellate review of the issue of excessiveness of the verdict — it moved for a new trial pursuant to Fed. R. Civ. P. 59.[6]

In fact, courts of appeal have remanded cases on the basis of the excessiveness of the jury's award where liability has been conceded, thereby eliminating any possibility of a directed verdict. *See, e.g., Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 780 n.1, 786 (5th Cir. 1983); *Carlton v. H. C. Price Co.*, 640 F.2d 573, 577, 584 (5th Cir. 1981); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Arnold v. Eastern Air Lines, Inc.*, 712 F.

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[6] See, Wright & Miller, *Federal Practice & Procedure*, §2540 at 611.

2d 899, 901, 906 n.12 (4th Cir. 1983), cert. denied, — U.S. —, 79 L.Ed.2d 168, 104 S.Ct. 703 (1984).

The statutory grant of appellate jurisdiction to the courts of appeal, found at 28 U.S.C. § 2106, is broad indeed:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Petitioner does not appear to dispute that an appellate court has jurisdiction to rule on a claim that a jury's verdict is excessive or that it has the power to set aside a verdict that it finds excessive. Indeed, it is clear that a court of appeals is empowered to reduce a damage award when, as a matter of law, the plaintiff is not entitled to an element of that award. *See, e.g., Overton v. United States*, 619 F.2d 1299, 1309 (8th Cir. 1980). Nor does petitioner dispute that an appellate court has both the jurisdiction and the power to consider whether a trial court has abused its discretion in admitting or excluding evidence.

Yet that is all the Court of Appeals for the First Circuit did in the present case: it ruled that the trial court erred in admitting certain evidence and that that error resulted in an excessive verdict; it preserved the essential judgment in petitioner's favor and remanded the case for a new trial on damages in light of the evidence presented to the jury and to the trial court, evidence which the petitioner unswervingly reargued to the trial

court in opposing respondent's motion for a new trial and to the Court of Appeals in his brief as appellee and in his petition for rehearing.

III. There Was No Evidence to Support Petitioner's Claim for Loss of Earning Capacity.

The Court of Appeals, having the complete trial record before it, ruled that the petitioner was not entitled to damages for loss of earning capacity because "there was no such proof." (721 F.2d at 873; Petition, 21a.) Its ruling was founded on the predicates of the petitioner's own case: his testimony that "he could do the work he previously had done" (721 F.2d at 872; Petition, 20a), his actual performance of those duties for nearly three years after the accident, his testimony at trial that he still considered himself able to do so and his counsel's argument to the jury that the petitioner "wants to return [to his former job] and he is in [sic] the opinion he can do the work." (721 F.2d at 871; Petition, 17a.) Even petitioner concedes that "an appellate court may reverse a jury decision . . . if there is *no* evidence whatsoever in the record supporting the jury's decision. . . ." (Petition, 26).

Nevertheless, petitioner now raises seven "distinct items of evidence" which he claims the Court of Appeals "ignored" (Petition, 27-29):

> *"1. A description of the precise character of pre-injury and post-injury job tasks."*

This item constitutes the most compelling reason why petitioner is not entitled to damages for loss of earning capacity. By his own admission, petitioner was fully fit and able after the accident to perform the same job tasks he performed before the accident. The Court of Appeals

clearly considered this evidence. (721 F.2d at 872; Petition, 16a-17a).

"*2. The display of the lost digit to the jury.*"

This evidence is not relevant to loss of earning capacity, but rather to those damages the petitioner may yet recover for physical pain and mental anguish at the new trial.

"*3. The display of the digit in action in a manual task.*"

Assuming petitioner's description of his difficulty in drawing on a chalkboard with his injured finger is accurate, there being no reference to it in the trial record, it bears no relevance to petitioner's ability to perform the work of a trainman, which skills petitioner was in fact able to perform.

"*4. A documentary hospital report [dated 8/29/77] indicating a recommendation that the petitioner undergo physical therapy.*"

This evidence reveals nothing about petitioner's earning capacity as of December 16, 1982, the time of trial.

"*5. A documentary hospital report [dated 8/29/77] indicating the risk of future amputation of the digit.*"

At most, such evidence may relate to damages for physical pain and mental anguish which petitioner may yet recover at the new trial.

"*6. A documentary hospital report [dated 10/4/77] indicating the diminshed sensation of the injured digit.*"

In light of the evidence of petitioner's ability to fully function for nearly three years after the accident as a

trainman and his continuing fitness at trial, any loss of future earning capacity resulting from such earlier "diminished sensation" would be purely speculative. Such evidence may be considered at the new trial on damages for physical pain and mental anguish.

> *"7. A documentary hospital report [dated 10/4/77] indicating tenderness in the tip of the mutilated digit."*

Such evidence relates solely to petitioner's claim for damages for physical pain and mental anguish.

The Court of Appeals recognized that petitioner's claim for damages for physical pain and mental anguish was "unresolved" and properly remanded the case for a new trial on that element of damages. If any of the "distinct items of evidence" are probative at all, they are probative of that issue, and petitioner is free to offer such evidence at the new trial.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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